

82.9.20/11

OGC 82-01852  
23 February 1982

MEMORANDUM FOR: Director of Central Intelligence  
Deputy Director of Central Intelligence

FROM:   
Deputy General Counsel

SUBJECT: DoD Proposal Regarding Executive Order on  
Classification

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1. Pursuant to your instructions, representatives from the Agency and Defense, as well as the Department of Justice, met this morning to discuss possible options for revising Executive Order 12065 to further protect certain technological information. I believe they have been able to reach a workable compromise that I recommend you support, although slightly different from the specific options you previously had considered. The compromise language provides:

6.2(b) In the interest of the national defense, and notwithstanding the provisions of sections 1.1(a), 1.1(b), 1.3(b), and 1.5(a)(4), the Secretary of Defense is authorized to classify information the unauthorized disclosure of which reasonably could be expected to be prejudicial to the national security because it would cause the loss to the United States of a military technological or operational advantage. A classification designation at a level lower than as prescribed in section 1.1 may be applied to such information. The Secretary of Defense shall promulgate regulations that will establish minimum standards for the safeguarding of such information.

The requirement for a trustworthiness standard, deleted by the DoD proposal by providing an exemption from section 4 of the order, has been restored, thus satisfying my primary concern.

2. Defense officials were very solicitous in satisfying our concerns with their earlier proposal. As you may recall, that proposal authorized the Secretary of Defense, in his complete discretion, to classify technological information without regard either to current classification levels or safeguarding, clearance, and trustworthiness requirements, effectively permitting the establishment of an alternative classification scheme that could seriously dilute the remaining provisions of the order. Thus, I recommended attempting to satisfy DoD's concerns by means of an amendment to the NSC implementing directive.

3. While it is my legal opinion that no amendment to the order itself is needed and that my earlier proposal presents a viable solution, Defense has raised practical problems that I agree cannot reasonably be ignored. In effect, the size and nature of the DoD bureaucracy is such that any system short of an additional classification level may very well be doomed to failure.

4. Accordingly, my staff has proposed revising the DoD proposal in a way that satisfies my legal concerns and is acceptable to DoD lawyers and officials addressing the matter on behalf of General Stilwell. This proposal authorizes a classification level lower than Confidential for limited categories of technical data, and would permit less stringent, but acceptable, safeguarding standards. More important, it does not eliminate the trustworthiness requirements I believe are essential. A significant characteristic of this proposal is that, unlike the earlier DoD proposal, it does not provide a broad exemption from all the classification and safeguarding provisions of the order so as to create an entirely new system. Instead, it deviates from the basic features of the order only where absolutely necessary to establish any new classification level. For example, the order's prohibitions on classifying to conceal violations of law, to prevent embarrassment, and to restrain competition, highly visible restraints, will not be eliminated as proposed by DoD. Accordingly, this proposal resolves my legal concerns and, I believe, any reasonable concerns with adverse public reaction to the proposal.

5. I believe the revised proposal offers an appropriate solution to the difficult problem of protecting sensitive U.S. technology. While I have some lingering concern with the apparent lack of precision of the language regarding information to be classified, and recognize that a possibility exists for questioning the proposed system in court, I believe those concerns are minor at this time and recommend you support DoD

efforts to include the proposal in the new order. Accompanying this memorandum is correspondence I suggest you send to Secretary Weinberger if you concur. I am available to prepare appropriate correspondence to David Stockman expressing your support if Mr. Carlucci agrees with this new proposal on Friday.

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Attachment.

